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Supreme Court of the United States

No. 814.....

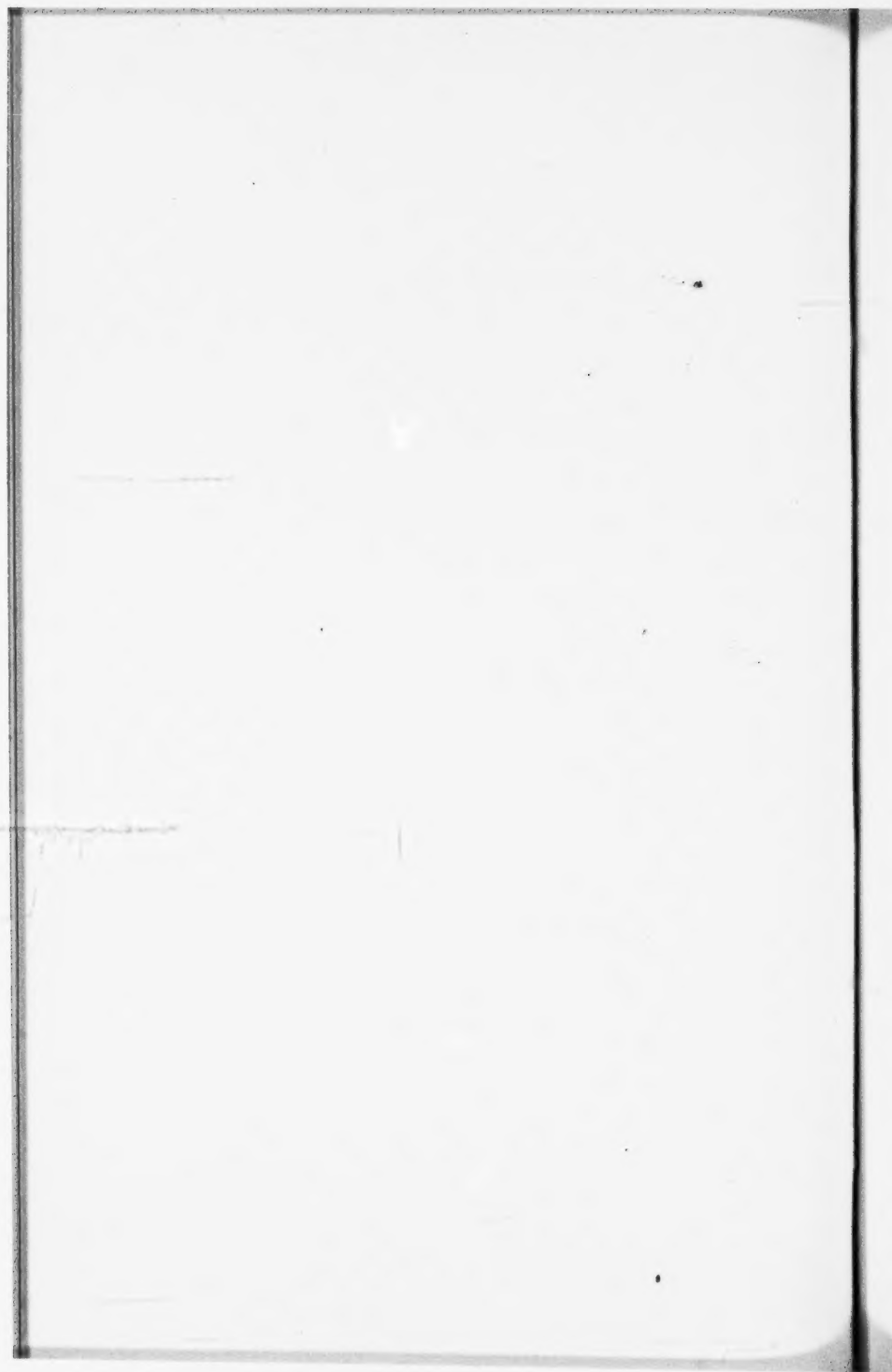
DAVID W. ONAN, C. WARREN ONAN AND ROBERT D. ONAN,
GENERAL PARTNERS DOING BUSINESS AS D. W. ONAN &
SONS, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

To the Honorable Justices of the Supreme Court of the
United States:

The petition of David W. Onan, C. Warren Onan and Robert D. Onan, general partners doing business as D. W. Onan & Sons, petitioner in the above captioned case, respectfully shows:

STATEMENT OF THE MATTER INVOLVED

The Business of the Petitioner.

The petitioner, D. W. Onan & Sons, is a limited partnership engaged in the business of the manufacture, sale and distribution of electrical power plants and equipment. It operates three plants in Minneapolis, Minnesota, employing approximately 2,000 persons.

**Proceedings Before the National Labor Relations Board
Under Section 9 of the National Labor Relations Act.**

Section 9 (c) of the National Labor Relations Act (Act of July 5, 1935), 49 Stat. 449, 29 U. S. C., *et seq.*, provides:

“Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.”

Proceedings under this section (Section 9) of the Act are known as representation proceedings, and hereinafter referred to as such.

Local 1139, United Electrical Radio and Machine Workers of America, C. I. O., petitioned the National Labor Relations Board for representation of the employees of your petitioner. The National Labor Relations Board conducted a hearing on said petition and on October 15, 1943, the National Labor Relations Board issued its Decision and Direction of Election in the following words:

“By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act and pursuant to Article III, Section 9 of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby directed that, * * * an election by secret ballot shall be conducted as early as possible, * * * etc.”

The election above ordered was duly held. The union lost the election 943 votes to 530 votes. Subsequently thereto proceedings were commenced under Section 10 of the National Labor Relations Act.

**Proceedings Under Section 10 of the National Labor
Relations Act.**

Section 10 (b) of the National Labor Relations Act provides:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purpose, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than 5 days after the serving of said complaint."

Under said Section 10 (b) of the Act the union filed two sets of charges in its complaints against the petitioner; the charges in said complaints allege the commissions of unfair labor practices. Said charges are identical and were recognized as such by the National Labor Relations Board. (See Petitioner's Exhibit D.)

Upon the filing of the two sets of charges against your petitioner the Board filed one set of charges in Case No. 18-R-822, which was the file number in the original representation proceedings under which the direction of election was filed. The other set of charges was given a new number, namely, 18-C-998. On January 1, 1944, the Board entered its order directing a hearing on both sets of charges, the said direction bearing both case numbers, and issued its order consolidating the cases. (See Petitioner's Exhibit C-1.) Thereafter, without notice, on January 20th there was issued an order by the Board severing the two cases. (See Petitioner's Exhibit C-2.) Thereafter, pursuant to Section 10 (c) of the Act, additional hearings were had upon the charges filed by the union against the petitioner but in the proceedings bearing Case No. 18-R-822. Section 10 (c) of the Act provides:

"The testimony taken by such member, agent, or agency of a Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the purposes of this Act."

After said hearings before the National Labor Relations Board, the Board then on July 5, 1944, issued its Supplemental Decision and Order, providing:

"We find the company's above described course of conduct during the period preceding the election prevented an expression by the employees therein of their free and uncoerced wishes as to representation."

This is practically the same wording as is in Section 10 (b) of the Act.

Upon these findings the Board set aside the previously held election and stated:

"It is hereby ordered that the election held on November 3, 1943, among the employees of David W. Onan, C. Warren Onan and Robert D. Onan, partners, d/b/a D. W. Onan & Sons, Minneapolis, Minnesota, be and it hereby is set aside."

Proceedings Subsequent to Supplemental Decision and Order of the Board.

Your petitioner therefore sought to have reviewed by the Circuit Court of Appeals for the Eighth Circuit the said Supplemental Decision and Order, pursuant to Section 10 (f) of the Act. Section 10 (f) of the National Labor Relations Act provides:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals in the United States."

Your petitioner is a person aggrieved by the Supplemental Decision and Order of said National Labor Relations Board. Said Order is final.

The National Labor Relations Board moved to dismiss the petitioner's petition for review of the Supplemental Decision and Order upon the ground that the proceeding before the Board was a representation proceeding pursuant to Section 9 of the National Labor Relations Act, and that no order in an unfair labor practice proceeding is based in whole or in part upon the representation proceeding; that the Circuit Court of Appeals was therefore without jurisdiction to review the proceeding. (See Board's Motion to Dismiss.)

The Circuit Court of Appeals granted the motion of the National Labor Relations Board to dismiss petitioner's petition for review. (See Decision of Circuit Court of Appeals.)

JURISDICTION

1. The date of the decision, order and adjudication of the Circuit Court of Appeals for the Eighth Circuit was October 5, 1944.

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

3. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

4. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

5. The matter involved is one of great national interest.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether the Supplemental Decision and Order of the National Labor Relations Board predicated on a finding of unfair labor practices and setting aside an election on those grounds is a final order and therefore appealable under Section 10 (f) of the Act.

2. Whether the National Labor Relations Board can arbitrarily conduct its proceedings simultaneously under Sections 9 and 10 of the Act concerning wholly the question of unfair labor practices, consolidate said proceedings, then sever them, and issue its Decision and Order ostensibly under Section 9 of the Act and thereby accomplish what it could not otherwise accomplish, namely, prevent what would otherwise be appealable, a review on the merits of the case by the Circuit Court of Appeals of the only issue involved, in contravention of Section 10 (f) of the Act.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be decided by this Court.

(a) In no case heretofore decided has the question arisen of whether an order predicated upon findings of unfair labor practices under consolidated proceedings under both Sections 9 and 10 of the Act is a final order and therefore appealable. In cases heretofore decided by this Court in connection with proceedings consolidated under Sections 9 and 10, the question of whether there has been a violation of the Act has not been the sole issue, or it has not been a final order issued in connection therewith by the National Labor Relations Board.

(b) This Court has not heretofore been called upon

to determine whether or not the National Labor Relations Board can, in consolidated proceedings, where the only question involved is one of violation of the Act, properly sever its proceedings subsequently to defeat an appeal based upon the merits, where no issue pertaining to the representation proceedings is involved.

These matters are of great concern to the petitioner and to all other persons who subsequently may be held to be violators of the Act in proceedings under Section 10 and through the arbitrary action of the National Labor Relations Board, be deprived of the right of review.

(c) The Order sought to be appealed from is final, in that the only way the Order setting aside the election can itself be set aside would be upon a finding that the petitioner was not guilty of the unfair labor practices complained of.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

This Court has repeatedly used language in various of its decisions indicating that review will lie when the Board issues an order requiring the employer to do something predicated upon the result of an election.

Despite the fact that an election was held and hence representation proceedings had terminated, the Circuit Court of Appeals ignored that fact when it dismissed the petition. It also ignored the fact, that the only question here involved is one involving alleged violations of the Act—completely disassociated from representation proceedings. Such a holding is contrary to both the meaning and intent of the Act and other applicable decisions of this Court.

The Circuit Court of Appeals has further failed to distinguish between cases involving administrative orders, such as:

1. An order of the Board determining or nominating the choice of the collective bargaining agent.

2. An order of the Board determining a pre-election matter.

3. An order of the Board predicated upon or involving other administrative or ministerial functions, as differentiated from orders predicated upon findings of violation of the Act, such as:

1. An order of the Board (after all ministerial or administrative functions have been done) setting aside an election already held.

Such a decision by the Circuit Court of Appeals ignores the plain language used by this Court in those cases where this Court has been called upon to determine the right of review of various types of orders of the Board.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a transcript of the Record in proceedings herein; that the Circuit Court of Appeals be directed to review the decision of the National Labor Relations Board in its findings relative to whether or not the petitioner has been guilty of alleged unfair labor practices, upon which said Supplemental Decision and Order was predicated, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem mete and just.

Respectfully submitted,

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